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NEWSLETTER

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THOUGHT LEADERSHIP ... APPLIED

ARBITRATION

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FOREWORD

The early part of this year witnessed a plethora of key decisions from the Apex Court and certain High Courts in the field of arbitration. Amongst the notable developments was the referral of the seminal ruling in *Chloro Controls* to a larger bench of the Supreme Court for re-examination of the applicability of the 'group of companies' doctrine in Indian arbitral jurisprudence. Established as a binding precedent for almost a decade, regulating non-signatories to the arbitration agreement, the outcome of the reference by the three-judges' bench in the *Cox and Kings* case is awaited with bated breath.

Addressing various interpretational issues, especially arising post the recent amendments of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), several pronouncements of this year contain an erudite exposition of the law governing domestic arbitrations particularly in the areas of challenges to the appointments of arbitrators, scope and ambit of interim reliefs, powers of the arbitral tribunal to award interest, limited examination in cases of references, etc.

Furthermore, in a praiseworthy effort to lend greater impetus to arbitrations in India, the Supreme Court in the case of *Shree Vishnu Constructors* has asked the Chief Justices of the High Courts to ensure that all pending applications for appointment of arbitrators or substitution of arbitrators and/or change of arbitrators, which are pending for more than one year from the date of filing, are decided expeditiously. The High Courts are following suit.

Through this Arbitration Newsletter, we endeavour to bring to our readers, the key developments that have emerged across the Indian arbitration space. In this second edition of the Newsletter, we detail the major judicial pronouncements of the courts in India from January to July 2022.

We do hope you find this edition of the Newsletter engrossing. We would appreciate any feedback or suggestions that our readers may have on this edition.

Happy Reading!

Litigation & Dispute Resolution Team
October 2022

CASE HIGHLIGHTS

RETROSPECTIVE OPERATION OF THE AMENDMENT ACT 2015 IN CASES WHERE PROCEEDINGS HAVE NOT YET COMMENCED

Ellora Paper Mills Ltd. v. State of Madhya Pradesh[1]

(Supreme Court, 04 January 2022)

The Supreme Court of India ("**SC**") held that the arbitral tribunal, which consisted solely of officers of the State Government, is invalid as the members were ineligible for appointment as arbitrators in terms of Section 12(5) read with the Seventh Schedule of the Arbitration Act. The SC noted that while the tribunal was constituted in 2001, no further steps had been undertaken in the arbitral proceedings. Considering that the arbitral proceedings had not commenced prior to the coming into force of the Amendment Act 2015 (i.e., 23 October 2015), the SC observed that the provisions of the Amendment Act would apply to the case. Accordingly, it held that the arbitral tribunal has lost its mandate by operation of law in view of Section 12(5) read with the Seventh Schedule, and a fresh arbitrator has to be appointed in terms of the amended provisions of the Arbitration Act.

JURISDICTION OF THE ARBITRAL TRIBUNAL

Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum Rajgurunagar[2]

(Supreme Court, 01 February 2022)

The SC held that the arbitrator appointed pursuant to the arbitration clause under the dealership agreement had no authority or jurisdiction to adjudicate on disputes pertaining to the lease agreement executed between the same parties. The SC observed that the lease agreement and the dealership agreement are distinct agreements, operating independently of each other, and contain separate arbitration clauses. Accordingly, the SC held that the impugned award, to the extent it pertains to the lease rent and lease period, was patently beyond the competence of the arbitrator and liable to be set aside.

Religare Finvest Limited v. Asian Satellite Broadcast Private Limited & Ors.[3]

(Delhi High Court, 10 January 2022)

The Delhi High Court ("**Delhi HC**"), relying on *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*[4], observed that where the underlying contract containing an arbitration agreement is insufficiently stamped, thereby touching upon the question of validity of the contract, it ought to be considered a jurisdictional issue and to be decided as a preliminary issue by the arbitral tribunal. The parties to the arbitration agreement, in such a scenario, cannot rely on the doctrine of severability of the arbitration clause to ignore the question of insufficiency of stamp duty altogether, as non-payment or deficiency in stamp duty may not invalidate the main contract, but this shortcoming renders such a document to be inadmissible in evidence and liable to be impounded, till the time requisite stamp duty is paid. Moreover, by virtue of the principle of *kompetenz- kompetenz*, the arbitral tribunal is vested with wide powers to rule on its jurisdiction – which includes the powers to examine any objection *qua* the existence or validity of the arbitration agreement, which by necessary extension includes the enforceability of a document deficiently stamped. Thus, the plea of insufficiency of stamp duty, touching upon the question of validity of the main agreement between the parties, is a jurisdictional issue to be decided as a preliminary issue under Section 16 of the Arbitration Act, as the same goes to the root of the matter.

Hunch Circle Private Limited v. Futuretimes Technology India Pvt. Ltd[5]

(Delhi High Court, 02 February 2022))

The Delhi HC has ruled that if a contract provides exclusive jurisdiction to a court for grant of interim relief(s) and enforcement of an arbitral award, then an application under Section 11(6) of the Arbitration Act can only be filed before the said court. In the present matter, the parties under an agreement had provided that the courts in Gurgaon will have exclusive jurisdiction *"especially for granting interim relief and enforcing arbitral awards"*. However, the application under Section 11(6) of the Arbitration Act was filed before the Delhi HC.

1. (2022) 3 SCC 1
2. 2022 SCC OnLine SC 131
3. Arb. A. (Comm.) 6-9/2021
4. (2021) 4 SCC 379
5. Arb. P. Nos. 1019, 1024 - 1026 of 2021

The Delhi HC, relying on *Cars24 Services Pvt. Ltd. v. Cyber Approach Workspace LLP*[6] and *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd*[7], dismissed the application and held that a contrary situation would arise if the application(s) under Sections 9 and 34 is filed in one court and an application under Section 11(6) is filed in another court, as the same would be discordant with Section 42 of the Arbitration Act which talks about the jurisdiction of the court.

Parenteral Drugs (India) Limited v. Gati Kintetsu Express Private Limited[8]

(Madhya Pradesh High Court, 12 April 2022)

The Madhya Pradesh High Court ("**Madhya Pradesh HC**") has ruled that even if a party disputes the existence of an arbitration agreement, an application under Section 34 of the Arbitration Act cannot be filed in a court not having jurisdiction under the arbitration agreement, solely on the ground that cause of action arose within its jurisdiction. In the present case, the putative arbitration agreement between the parties clearly provided that the courts at Hyderabad/ Secunderabad, Andhra Pradesh would have exclusive jurisdiction over the arbitration proceedings. Keeping in view the same, the HC observed that the award passed by the arbitrator at Hyderabad could not be challenged by the appellant under Section 34 before courts at Indore on the basis that there was no arbitration agreement between the parties and a part of the cause of action had arisen at Indore. The court while relying on *Brahmani River Pellets v. Kamachi Industries Ltd.*[9] observed that if such an interpretation is allowed, the very purpose of enacting Sections 16 and 34 of the Arbitration Act would stand defeated and lead to a chaotic situation.

RIGHTS OF NON-SIGNATORIES TO THE ARBITRATION AGREEMENT

Oil & Natural Gas Corporation v. Discovery Enterprises (P) Ltd[10]

(Supreme Court, 27 April 2022)

An application under Section 16 of the Arbitration Act was filed by a non-signatory seeking deletion from the arbitral proceedings since the arbitration agreement was between its group company and the claimant. The arbitral tribunal *vide* an interim award allowed the application filed by the non-signatory. In appeal, the SC noted that the following factors should be considered while applying the 'group of companies' doctrine:

- The mutual intent of the parties;
- The relationship of a non-signatory to a party which is a signatory to the agreement;
- The commonality of the subject matter;
- The composite nature of the transaction; and
- The performance of the contract.

The SC observed that the interim award was vitiated by the tribunal's failure to determine the legal foundation for applying the 'group of companies' doctrine when, as per the claimant, there existed economic unity between the non-signatory and its group company. As per the SC, the tribunal erred in not deciding an application filed by the claimant for discovery and inspection to obtain evidence that the non-signatory was a part of the same group, and by incorrectly deciding the jurisdictional challenge under Section 16 first.

Cox and Kings Ltd. v. SAP India Private Ltd. & Anr.[11]

(Supreme Court, 06 May 2022)

A three-judges' bench of the SC has referred the decision in *Chloro Controls*[12] to a larger bench for re-examination and exposition on the intricacies of the 'group of companies' doctrine, and has put up the following issues for consideration:

- Whether the phrase 'claiming through or under' appearing in Section 8 and 11 of the Arbitration Act could be interpreted to include the 'group of companies' doctrine?
- Whether the 'group of companies' doctrine as expounded by *Chloro Controls* and subsequent judgements, is valid in law?

As per the SC, until a legal basis for allowing joinder(s) of third parties to an arbitration agreement is provided, policy consideration of efficiency cannot itself be the sole ground to bind a third party or non-signatory to the arbitration.

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6. 2020 SCC OnLine Del 1720
7. (2020) 5 SCC 399
8. Arb. Appeal No. 16 of 2022
9. (2020) 5 SCC 462
10. 2022 SCC OnLine SC 522
11. Arb. Pet. (Civil) 38 of 2020
12. (2013) 1 SCC 641

LIMITED EXAMINATION WHILE CONSIDERING A SECTION 8 REFERENCE

Lindsay International Private Limited & Ors. V. Laxmi Niwas Mittal & Ors.[13]

(Calcutta High Court, 21 January 2022)

The Calcutta High Court ("**Calcutta HC**") was considering whether non-permissibility of bifurcation of subject-matter or causes of action in a suit should be considered by a court in an application under Section 8 of the Arbitration Act (as amended in 2016). In view of the amendment to Section 8, the unambiguous mandate on the court is to refer the parties to arbitration, regardless of any judgment, decree or order of the SC or any court. The only exception being that it is *prima facie* established that there is no valid arbitration agreement between the parties, and such onus rests squarely on the party who seeks to resist the reference. The Court observed that the SC's dictum in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*[14] that bifurcation of causes of action and parties cannot be permitted in adjudicating an application under Section 8 of the Arbitration Act is no longer a relevant factor to be considered by the court at the stage of reference when hearing an application under Section 8 post the 2016 amendment to the Arbitration Act.

SCOPE AND AMBIT OF INTERIM RELIEFS UNDER SECTION 9

Chetan Iron LLP v. NRC Ltd.[15]

(Bombay High Court, 24 January 2022)

The Bombay High Court ("**Bombay HC**") held that p*rima facie*, a relief of specific performance or an injunction could not be granted to the petitioner considering the nature of the contract between the parties. Therefore, a relief of temporary injunction as an interim measure under Section 9 of the Arbitration Act could also not be granted pending the arbitral proceedings. The Bombay HC observed that since the term of the contract between the parties had been specified and the parties could choose to terminate the contract prior to expiry of the term by issuing a notice to the other party, the contract in question was clearly determinable. As such, the courts would have to be guided by the principle of law. The courts have consistently refused injunctive reliefs and specific performance of the contract when the nature of the contract is determinable in view of Section 41(e) read with Section 14(d) of the Specific Relief Act, 1963 (as amended in 2018) – which provisions are equally applicable when considering an application under Section 9 of the Arbitration Act.

Satyen Construction v. State of West Bengal & Ors.[16]

(Calcutta High Court, 08 April 2022)

The Calcutta HC re-emphasised that courts cannot grant the final relief sought by a claimant by way of the arbitral award in an application under Section 9 of the Arbitration Act. An application had been filed by the petitioner under Section 9 of the Arbitration Act seeking liberty to withdraw certain sums from the deposits made by the award debtor in court pursuant to directions by the Calcutta HC in appeal proceedings. The Calcutta HC, relying on the principles laid down by the SC in *Adhunik Steels Ltd. v. Orissa Manganese and Miners*[17], observed that the true object and intention behind Section 9 is to provide for interim or provisional measures to a party before or during or any time after making an award which are protective in nature. The orders contemplated under Section 9 inter alia pertain to preservation, interim custody or sale of goods which are the subject matter of the arbitration agreement, securing the amount in dispute in the arbitration, detention, preservation or inspection of any property or thing which is the subject matter of arbitration, interim injunction or appointment of a receiver or such other interim measures of protection which may appear to be just and convenient. The scope of Section 9 cannot be extended to enforcement of the award or granting the fruits of the award to the award-holder as an interim measure in as much as the order sought goes beyond the realm of securing the petitioner and shifts to encashment of the security or equitably dealing with the same. Therefore, even after the amended Section 36, the right to withdraw the deposited amount by the judgement debtor cannot be stretched as an interim protection under Section 9 of the Arbitration Act.

13. Old GA No. 174 - 175 of 2017
14. (2003) 5 SCC 531
15. AIR 2022 Bom 104
16. A.P. No. 78 of 2021
17. (2017) 7 SCC 125

Pink City Expressway Private Limited v. National Highways Authority of India[18]

(Delhi High Court, 15 June 2022)

The Delhi HC has ruled that the powers under Section 9 of the Arbitration Act cannot be exercised for directing specific performance of the contract itself and can be exercised only for preservation of the subject matter of the dispute till the decision of the arbitral tribunal. In the present case, the applicant sought orders directing the respondent to approve and consent to extension of time under the concession agreement entered into between them. It was held that such a direction to the respondent, to extend the contract for a further period beyond the extension already granted by the respondent, would be tantamount to granting specific relief of the contract which would be beyond the powers of the courts under Section 9 of the Arbitration Act.

APPOINTMENT OF ARBITRATORS AND SCOPE OF COURT'S INTERFERENCE IN SECTION 11 APPLICATIONS

Pendency of Sections 11(5) and 11(6) Petitions before various courts

M/s Shree Vishnu Constructors v. The Engineer in Chief, Military Engineering Services and Ors.[19]

(Supreme Court, 19 May 2022)

Considering the pendency of a large number of applications for appointment of arbitrator(s) in many HCs for over four to five years, the SC requested all the Chief Justices of the respective HCs to ensure that all pending applications under Sections 11(5) and 11(6) of the Arbitration Act and/or any other applications either for substitution of arbitrator and/or change of arbitrator, which are pending for more than one year from the date of filing, must be decided within the next six months.

Applicability of Section 11(6)

Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal and Ors[20]

(Supreme Court, 05 May 2022)

The SC has clarified that sub-section (5) of Section 11 shall be attracted in cases where there is no procedure for appointment of an arbitrator agreed upon as per sub-section (2) of Section 11; whereas sub-section (6) of Section 11 is applicable in cases where there is a contract containing an arbitration agreement and the appointment procedure is agreed upon. Where the parties themselves referred the dispute for arbitration to the sole arbitrator by mutual consent, sub-section (6) shall not be attracted at all and an application under Section 11(6) shall not be maintainable.

Further, the SC held that where the mandate of the arbitrator is sought to be terminated on the ground mentioned in Section 14(1)(a) (i.e., arbitrator is *de facto* or *de jure* unable to perform its functions), the aggrieved party has to approach the concerned 'court' as defined under Section 2(e) of the Act and only after the decision by the concerned 'court' that the mandate of the arbitrator is terminated, the arbitrator can be substituted according to the rules as were applicable at the time of initial appointment of the arbitrator. This question cannot be entertained and decided in an application under Section 11(6) of the Act.

Derivados Consulting Pvt. Ltd. v. Pramara Promotions Pvt. Ltd.[21]

(Bombay High Court, 08 June 2022)

The Bombay HC, while rejecting an application for appointment of arbitrator under Section 11(6) of the Arbitration Act, held that the purported arbitration clause in the contract does not create a binding arbitration agreement and is merely an enabling clause for parties to enter into a further agreement to refer disputes to arbitration. The HC observed that the jurisdiction of the courts under Section 11(6) is confined to examination of the existence of an arbitration agreement, which is to be understood in a narrow sense. As per the Bombay HC, a plain reading of sub-section (1) of Section 7 of the Arbitration Act implies that there appears to be no scope to hold that when the parties to an arbitration agreement provide that they 'may' refer the disputes to arbitration, the word 'may' takes away a conclusive and a mandatory affirmation between the parties, to be certain, to refer the disputes to arbitration. The expression merely indicates that the parties agree to a future possibility, which would encompass a choice or a discretion available to a party to enter into such an agreement.

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18. FAO(OS) (COMM) 158/2022
19. SLP (C) No. 5306 of 2022
20. C.A. No.2935 – 2938 of 2022
21. Arbitration Application No. 4 of 2022

Issue of Limitation

Huawei Telecommunications (India) Co. Pvt. Ltd. & Anr. v. Wipro Ltd.[22]

(Delhi High Court, 24 January 2022)

The Delhi HC relied upon the SC's decision in *BSNL v. Nortel Network (India) (P) Ltd.*[23] to clarify that the period of limitation for filing of an application seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made under the underlying commercial contract. The limitation for filing a Section 11 application is 3 years from the date of refusal to appoint the arbitrator or on expiry of 30 days, whichever is earlier. As regards the limitation relating to the substantive claims, the Delhi HC found that in view of the continuous exchange of correspondences between the parties, there has been continuous cause of action and persistent demand raised by the petitioner and therefore, the claims raised were not barred by time.

M/s. Terra Infra Development Ltd. v. M/s. NCC Ltd.[24]

(Telangana High Court, 20 June 2022)

The Telangana HC ("**Telangana High Court**") has reiterated that the law of limitation is applicable to arbitral proceedings by virtue of Section 43 of the Arbitration Act and that the period of limitation starts to run from the date on which the right to initiate arbitral proceedings accrues to the claimant. It was further held that the question whether a claim is barred by limitation can be decided at the preliminary stage of appointing an arbitrator under Section 11 of the Arbitration Act itself. The Telangana HC, while relying on the judgment in *Vidya Drolia v. Durga Trading Corporation*[25], observed that only where the claims are ex facie time-barred, the Court can refuse to appoint an arbitrator and in all other cases, the matter shall be referred to arbitration where the arbitrator shall decide such issues.

Appointment of Arbitrator

M/s Modern Construction Company v. State of Jharkhand[26]

(Jharkhand High Court, 02 March 2022)

The Jharkhand HC (**"Jharkhand High Court"**) has held that after an arbitral award has been set aside and quashed by the court under Section 37 of the Arbitration Act, an application under Section 11(6)(c) of the Arbitration Act for appointment of an arbitrator afresh is maintainable. In the instant case, the petitioner had entered into a contract with the State of Jharkhand and after a dispute arose between the parties, an arbitral tribunal was constituted which passed an award in favour of the petitioner that was later on set aside by the court. The petitioner then filed a fresh application under Section 11(6)(c) of the Arbitration Act which was held to be maintainable by the Jharkhand HC.

M/s Atul & Arkade Realty v. I.A. & I.C. Pvt. Ltd.[27]

(Bombay High Court, 06 May 2022)

The Bombay HC has held that when allegations of fraud and forgery are made challenging the execution of an agreement and there exists a duality of expert opinion on the genuineness of the agreement, the court is required to refer the matter to arbitration. In the instant case, an application under Section 11 of the Arbitration Act was filed by the applicant for the appointment of a sole arbitrator. The dispute arose when the respondent opposed the Section 11 application on the ground that the underlying agreement between the parties is a false and fabricated document, and the applicant has not paid sufficient stamp duty on the said agreement.

The Bombay HC appointed a sole arbitrator to decide upon the validity and authenticity of the arbitration agreement. The Bombay HC also listed down factors to be taken into consideration while deciding on the issue of fraud including specificity, spontaneity, and gravity of the allegations, and whether the allegations relate to undermining the validity of the underlying contract or involve a public law element.

Challenge to Appointment of Arbitrator

Union of India v. APS Structures Pvt. Ltd.[28]

(Delhi High Court, 06 January 2022)

The Delhi HC held that recourse to Section 14 of the Arbitration Act is not available in respect of any challenge to the arbitrator under Section 12(1) but is

22. Arb. P. 365 of 2019
23. (2021) 5 SCC 738
24. Arb. Appl. No. 113/ 2021
25. (2021) 2 SCC 1
26. 2022 SCC OnLine Jhar 175
27. Arb. Ap. No. - 72 of 2013
28. O.M.P. (T) (COMM.) 2/2022 & IA No. 198/2022

only available in the event the arbitrator is ineligible by virtue of Section 12(5) of the Arbitration Act. A challenge to the appointment of an arbitrator, other than on the ground of ineligibility as specified under Section 12(5), is required to be made as per the procedure set out under Section 13 of the Arbitration Act in the first instance before the arbitral tribunal.

The Delhi HC relied on *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited*[29], where it was held that ineligibility goes to the root of the appointment and if any arbitrator becomes 'ineligible' to act as an arbitrator under Section 12(5) read with Seventh Schedule of the Arbitration Act, he becomes *de jure* unable to perform his functions or proceed any further with the arbitral proceedings in terms of Section 14(1)(a). In such a case, there is no need to go to the arbitral tribunal under Section 13 and an application may be filed under Section 14(2) before the court to decide on the termination of the arbitrator's mandate on this ground. On the other hand, where grounds stated in the Fifth Schedule are disclosed giving rise to justifiable doubts as to the arbitrator's independence or impartiality, such a question must be determined as a matter of fact by the tribunal under Section 13 of the Arbitration Act. If the challenge is not successful, the tribunal is required to continue the arbitral proceedings under Section 13(4) and pass an award. Only after an award is passed, the party challenging the arbitrator's appointment on grounds contained under the Fifth Schedule may make an application for setting aside the award under Section 34.

Envirad Projects Pvt. Ltd. v. NTPC Ltd.[30]

(Delhi High Court, 18 January 2022)

The Delhi HC, while considering a petition filed under Section 11(6) of the Arbitration Act for appointment of arbitrators, relied upon the judgment of *Perkins Eastman Architects DPC & Anr v. HSCC (India) Ltd.*[31] and rulings passed by the coordinate benches of the Delhi HC, and reiterated that no single party can be permitted to unilaterally appoint the arbitrator as it would defeat the purpose of unbiased adjudication of disputes between the parties; and that in cases where one of the parties to the contract has been given the exclusive right to appoint the arbitrator, such arbitration clause is not enforceable in law and the task of appointing the arbitrator devolves on the court.

Section 7 of the Insolvency Code *vis-a-vis* Section 11 of the Arbitration Act

Jasani Realty Pvt. Ltd. v. Vijay Corporation[32]

(Bombay High Court, 25 April 2022)

The Bombay HC was considering whether filing of proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IB Code**") before the National Company Law Tribunal ("**NCLT**") would preclude the Court from exercising jurisdiction under Section 11 of the Arbitration Act to appoint an arbitrator. The Bombay HC, relying upon the decision in *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund*[33], observed that mere filing of the proceedings under Section 7 of the IB Code cannot be treated as an embargo on the court exercising jurisdiction under Section 11 of the Arbitration Act, as Section 7 proceedings attain *in rem* character only after an order under sub-section (5) of Section 7 of the IB Code is passed by the NCLT. In such cases, Section 238 of the IB Code would get triggered to override the application of all other laws and the corporate insolvency resolution process would commence against the corporate debtor as per Section 13 of the IB Code which would be proceedings *in rem*. However, where the NCLT is yet to admit the petition under Section 7 of the IB Code, the court would not be precluded from exercising its jurisdiction under Section 11 of the Arbitration Act, when there is an arbitration agreement between the parties and the same has been invoked.

Accord and Satisfaction of Claims

Indian Oil Corporation Limited v. NCC Limited[34]

(Supreme Court, 20 June 2022)

The SC relied upon the decision in *Vidya Drolia v. Durga Corporation*[35] and ruled that even when it is observed

29. (2018) 12 SCC 471
30. Arb. Petition 27/2022
31. 2019 SCC Online SC 1517
32. AIR 2022 Bom 155
33. (2021) 2 SCC 436
34. 2022 SCC OnLine SC 896
35. (2021) 2 SCC 1

that an issue with regard to 'accord and satisfaction' of claims may/ can be considered by a court at the stage of deciding a Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts or a reasonably good and arguable case, the same should be left to the arbitral tribunal. The SC further observed that it is wrong to suggest that post insertion of sub-section (6A) to Section 11 of the Arbitration Act *(subsequently deleted vide the 2019 Amendment Act),* the scope of inquiry by the courts in a Section 11 application has been confined only to ascertain whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the dispute in question. Even though the arbitral tribunal may have the jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability, the same can also be considered by the courts at the stage of deciding a Section 11 application if the facts are clear and glaring and in view of the specific clauses in the contract binding between the parties, whether the dispute is non-arbitrable and/or falls within the excepted clause. The court may also *prima facie* consider the aspect of 'accord and satisfaction' of claims at the stage of a Section 11 application.

STATEMENT OF CLAIMS AND COUNTER-CLAIMS

Union of India v. Indian Agro Marketing Co Operative Ltd.[36]

(Delhi High Court, 02 May 2022)

The Delhi HC has ruled that in exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution, the Court could interfere with an order passed by an arbitrator under Section 25(a) of the Arbitration Act terminating the arbitral proceedings for non-filing of the statement of claim. It was observed that the Arbitration Act does not provide for any alternate remedy to challenge the impugned order passed by the tribunal either under Section 34 or Section 36 or any other provisions thereof. Thus, the Delhi HC relied on the SC's decision in Srei *Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd.*[37] wherein it was held that when the claimant is able to show sufficient cause for not filing the statement of claim within the stipulated time, the arbitral tribunal could not terminate the proceedings under Section 25(a) of the Arbitration Act. Accordingly, the Delhi HC permitted the challenge to the impugned order by way of a petition under Article 227 of the Constitution.

National Highway Authority of India v Transstroy (India) Limited[38]

(Supreme Court, 11 July 2022)

The SC held that a counter claim of the party cannot be rejected only on the basis that the said party had not separately notified the claim in terms of the contract provision and/or followed the conciliation process prescribed in respect of such claim before invoking arbitration. In the present matter, the SC was hearing an appeal against an order of the Delhi HC upholding the order of the arbitral tribunal, whereby the appellant's application for extension of time to file its counter claim was rejected. The SC held that when Section 23 (2A) of the Arbitration Act expressly provides for filing of counter claim or set off, there is no reason for curtailing the right of the appellant to make a counter claim/ set off. If the counter claim is not allowed, it may lead to parallel proceedings before multiple fora. The SC observed that there is a difference between the expressions 'claim' which may be made by one side and 'dispute' which by its definition has two sides. In the given matter, the dispute between the parties arose in respect of termination of the contract by the appellant. Accordingly, once any dispute, difference or controversy is notified in terms of the contract provisions, the entire subject matter including counter claim or set off would form the subject matter of the arbitration.

POWER OF ARBITRAL TRIBUNAL TO AWARD INTEREST

Union of India v. Manraj Enterprises[39]

(Supreme Court, 18 November 2021)

The SC reiterated that the arbitrator, being a creature of the contract, is bound by the terms of the contract insofar as awarding of interest is concerned. Section 31(7)(a) of the Arbitration Act, dealing with the power to award interest begins with the words *"unless otherwise*

36. CM(M) No. – 424 of 2021
37. (2018) 11 SCC 470
38. 2022 SCC OnLine SC 832
39. (2022) 2 SCC 331/

agreed by the parties…", thus indicative that the power of the tribunal to award interest can be circumscribed by the agreement between the parties. Accordingly, the SC held that the arbitrator in the instant case has erred in awarding *pendente lite* and future interest on the amount due and payable to the contractor under the contract in question, when the contractor had agreed that he shall not be entitled to interest on the amounts payable under the contract.

UHL Power Company Ltd. v. State of Himachal Pradesh[40]

(Supreme Court, 07 January 2022)

The SC has restated that an arbitral tribunal is empowered to grant post-award interest on the interest amount awarded. Reiterating the principle laid down in *Hyder Consulting (UK) Ltd. v. State of Orissa*[41], the SC observed that 'arbitral award' referred to in the phrase 'sum directed to be paid by an arbitral award' appearing in Section 31(7)(b) of the Arbitration Act refers to a sum which includes the interest and, therefore, a tribunal may award interest on the sum which is inclusive of principal sum adjudged and the interest. Accordingly, the SC rejected the findings of the appellate court in the impugned judgment that the arbitral tribunal was not empowered to grant compound interest or interest upon interest and only simple interest on the principal amount claimed could be awarded in favour of the appellant.

APPLICABILITY OF SECTION 34(4) OF THE ARBITRATION ACT

I-Pay Clearing Services Pvt. Ltd. v. ICICI Bank Ltd.[42]

(Supreme Court, 03 January 2022)

The SC observed that in view of the words 'where it is appropriate' appearing in Section 34(4) of the Arbitration Act, it is not always obligatory for the court to remit the matter to the arbitral tribunal merely because an application is filed by a party under Section 34(4) of the Arbitration Act. The discretionary power conferred under Section 34(4) is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. The SC appreciated the difference between 'findings' and 'reasons' and observed that Section 34(4) can be resorted to record reasons on the findings already given in the award. Since, in the instant case, there were no findings at all on a specific issue of termination of contract, the SC ruled that remission under Section 34(4) was not permissible.

UEM India Pvt. Ltd. v. ONGC Ltd.[43]

(Delhi High Court, 15 March 2022)

The Delhi HC has observed that there is no remedy available to the parties against an order passed by the arbitral tribunal under Section 34(4) of the Arbitration Act as the same is not a fresh award which can be challenged by filing a separate petition under Section 34 of the Arbitration Act. Consequently, while a challenge in the petition under Section 34 remains to the impugned award - that is now to be read in light of the orders passed by the arbitral tribunal under Section 34(4) of the Arbitration Act – the order under Section 34(4) enables the petitioner to raise fresh or additional grounds, which perhaps were not expedient to raise when the petition was filed.

40. (2022) 4 SCC 116
41. (2015) 2 SCC 189
42. (2022) 3 SCC 121
43. O.M.P. (COMM) 393/2018

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